STATE OF MICHIGAN COURT OF APPEALS

PIERRE TREMBLAY,

Plaintiff-Appellant,

UNPUBLISHED September 17, 2002

V

SWOBODA, INC.,

No. 231042 Kent Circuit Court LC No. 99-010165-CL

Defendant-Appellee.

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from a grant of summary disposition on his lone count of employment discrimination under the Civil Rights Act, MCL 37.2101 *et seq.*, stemming from his termination by defendant. Plaintiff alleged that the prevalent use of the German language at defendant company amounted to employment discrimination in contravention of the statute. We affirm.

Intentional employment discrimination can be proven with either direct or circumstantial evidence. *Debrow v Century 21 (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001). If plaintiff has no direct evidence of discrimination, a prima facie case of discrimination can also be made by utilizing circumstantial evidence under either the disparate treatment or disparate impact theories developed by the courts. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). In this case, plaintiff sought to prove intentional discrimination with direct evidence, as well as disparate treatment through the use of circumstantial evidence involving the shifting burden analysis first established in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), and also through the use of the disparate impact method of proof.

With regard to direct evidence, usually a plaintiff, to be successful, must produce evidence of a remark made by a decision maker which was associated with the employment decision. See *DeBrow, supra*, at 538. Plaintiff, however, concedes that no one made a comment to him that he was being terminated because he was not German. Nonetheless, plaintiff asserts that defendant's predominant use of the German language in the workplace amounts to evidence of intentional discrimination. Plaintiff refers to the general discussions, training on the automated equipment, equipment manuals and computers governing machines, all of which were

in German. That all of this occurred, however, is not direct evidence of national origin discrimination. Direct evidence has been defined as evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor. *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997). For example, and as already noted, racial slurs regarding the employment decisions made by a decision maker constitute direct evidence of racial discrimination that is sufficient to allow a plaintiff's case to proceed to the jury. *Id.* Here, however, the use of German in the workplace is not clear evidence of animus towards non-Germans. Plaintiff fails to explain how the speaking of German, in and of itself, is direct evidence of such animus; plaintiff merely concludes that it is. In the absence of any explanation or evidence, this argument must fail.

In the absence of any direct evidence of discrimination towards non-German speaking individuals, plaintiff is left to utilize the McDonnell Douglas burden-shifting framework to establish a prima facie case of discrimination under the disparate treatment theory. Matras v Amoco Oil Co, 424 Mich 675, 683; 385 NW2d 586 (1986). Under this test, a plaintiff must prove, by a preponderance of the evidence, that (1) he or she was a member of the protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone not a member of the protected class. Lytle v Malady (On Rehearing), 458 Mich 153, 177, n 6; 579 NW2d 906 (1998). This test should not be mechanically applied; rather, a court should grant due deference to the unique facts of an individual case. Id. at 173, n 19. "Prima facie case" in this context does not mean that the plaintiff produced sufficient evidence to allow the case to go to a jury, but instead means that the plaintiff produced enough evidence to create a rebuttal presumption of discrimination. Meagher v Wayne State University, 222 Mich App 700, 710-711; 565 NW2d 401 (1997). The purpose of the prima facie test is to 1) remove the most common nondiscriminatory reasons for the employer's action, such as poor employee performance, and 2) to force the employer to articulate a nondiscriminatory reason for the adverse employment actions. Town v Michigan Bell Telephone Co, 455 Mich 688, 695; 568 NW2d 64 (1997).

We will assume, without deciding, that plaintiff established that he was a member of a protected class, and there is no dispute that he was subjected to an adverse employment action. However, we hold that plaintiff failed to create a genuine issue of material fact that he was qualified for the position, or that he was replaced by someone not a member of a protected class. As such, we affirm the trial court's grant of summary disposition.

As noted, a plaintiff must show that he was qualified for his position. Being qualified for a job, for the purpose of establishing a prima facie case of discrimination, requires only minimal qualification. *Town, supra,* 455 Mich at 699; *Wilcoxon, supra,* 235 Mich App at 369. An employee is qualified if he was performing his job at a level that met his employer's legitimate expectations. *Town, supra.* Here, plaintiff fails to show that he was performing his job at that level.

The evidence submitted with the motion shows that plaintiff conceded that he was not able to perform the part of the job that required the ability to communicate in German. Plaintiff admits that he was unable to communicate with several of the vendors who were responsible for training him. As a result of not being properly trained on the equipment, and because many of

his co-workers spoke only German, plaintiff "could not manage [the automation project he was assigned] very well." Simply because plaintiff believed that he was performing those jobs that were accompanied with a manual written in English does not establish that plaintiff was performing all of his job responsibilities well enough to meet defendant's expectations. In fact, plaintiff concedes that he was unable to perform the central function of his job. Hence, plaintiff failed to raise a genuine issue of material fact regarding his qualifications for the job. *Town*, *supra*.

Finally, plaintiff must show that he was replaced by someone not of the protected class. Again, plaintiff has failed to do so. Here, the only evidence presented was that plaintiff's responsibilities were delegated to several other of defendant's employees, and not given to a single replacement. In *Lilley v BTM Corp*, 958 F2d 746, 752 (CA 6, 1992), the Sixth Circuit Court of Appeals stated that "[s]preading the former duties of a terminated employee among the remaining employees does not constitute replacement." Accord: *Barnes v Gen Corp Inc.*, 896 F2d 1457 (CA6, 1990). Therefore, because plaintiff failed to show how he was qualified for his position, and because he fails to show that he was replaced by a member not in the protected class, plaintiff failed to establish a prima facie case of employment discrimination under a disparate treatment theory. Because plaintiff has failed to set forth a prima facie case of employment discrimination under this particular theory, we need not address plaintiff's argument that defendant's proffered explanation was pretextual.

Plaintiff also asserts that he can prove discrimination under a disparate impact theory. A claim of disparate impact involves employment practices that are facially neutral in their treatment of different groups but that fall more harshly on one group than another and cannot be justified by business necessity. *Smith v Goodwill Industries of West Michigan, Inc*, 238 Mich App 438, 450-451; 622 NW2d 337 (2000). To establish a prima facie case under a disparate treatment theory, plaintiffs must make a showing that a defendant had a discriminatory motive. *Id.* Once a plaintiff establishes a prima facie case of discrimination under the disparate impact theory, a defendant has the obligation to prove that the "qualification is reasonably necessary to the normal operation of the business." MCL 37.2208.

Here, plaintiff asserts that the use of German in the workplace prevented him, as someone neither German nor German-speaking, from being able to learn and perform his job in a satisfactory manner. Plaintiff asserts that the use of the German language, as a classification that does not directly impact upon the protected classes under the CRA (e.g., race, national origin, sex, etc.), actually impacts members of his group (non-German workers) more harshly than others. Plaintiff's group, however, is essentially one person, as he is the only non-German speaking person not of German national origin that he refers to in his brief.¹

The trial court found that, because of the prevalence of the German language at defendant's company – to communicate with employees, vendors, clients and to operate the German equipment which came with manuals written in German – speaking German was a

¹ Plaintiff mentioned one other employee, Jeffrey DeMara, a production supervisor, who did not speak German and who was terminated. However, plaintiff failed to provide any significant details about DeMara's separation for us to conclude that he and DeMara were similarly situated.

"desirable, if not crucial ability in terms of this company." We agree with the trial court's determination. Plaintiff's training was conducted, at least in part, in German. Plaintiff noted that many of the people he managed on the project spoke "mostly German" and, as a result, plaintiff's ability to communicate with his employees, as well as manage his projects, suffered. Plaintiff's inability to speak German resulted in some redesigns of the automation line. Plaintiff stated that he had a difficult time with equipment that came with German manuals. Generally, plaintiff conceded that it was his inability to speak German that affected his job performance. Based on these facts, we believe that plaintiff's inability to speak German clearly impacted plaintiff's ability to perform the job.

According to MCL 37.2208, however, if an otherwise discriminatory act is a "bona fide occupational qualification reasonably necessary to the normal operation of the business," the employer is not liable for discrimination. Here, despite the fact that defendant hired plaintiff with the knowledge that he did not speak German, the evidence presented to this Court shows that the ability to speak German was essential to the job. Therefore, summary disposition of plaintiff's claim was appropriate. See *Stephen v PGA Sheraton Resort Ltd.*, 873 F2d 276, 280-281 (CA11, 1989) (holding that plaintiff's inability to speak English was a valid business reason for terminating plaintiff's employment, and thus his disparate impact claim failed).

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Christopher M. Murray